



Litigation Update

Litigation Section News

March 2008

We may be old, but we have not been doing this job for 50 years. A banner on our February 2008 issue proclaimed "50th Anniversary Issue." This was somewhat of an exaggeration. Our February issue was the 50th issue of Litigation Update sent to the members of the Litigation Section of the State Bar. But your managing editor, undoubtedly considering your senior editor's ancient demeanor, mistook his wisdom for length of service.

City ordinances preempted by state law. Two new cases have held that the power of cities to enact ordinances does not permit them to regulate in areas fully covered by state law. In *Fiscal v. City and County of San Francisco* (Cal. App. First Dist., Div. 4; January 9, 2008) 158 Cal. App. 4th 895, [2008 DJDAR 290], the First District Court of Appeal voided a San Francisco ordinance prohibiting possession and

sale of guns within the city. In *City of Los Angeles v. 2000 Jeep Cherokee* (Cal. App. Second Dist., Div. 1; February 7, 2008) [2008 DJDAR 2087], the Second District Court of Appeal similarly voided a local ordinance permitting the seizure of vehicles used in soliciting prostitution. Both subjects are fully covered under state law and therefore local governments cannot impose additional or different requirements or remedies. *See also*, *O'Connell v. City of Stockton* (July 26, 2007) 41 Cal.4th 1061, [162 P.3d 583, 63 Cal.Rptr.3d 67].

Litigation privilege does not prevent litigant from suing own expert witness. Plaintiffs hired experts to testify in an insurance appraisal proceeding under *Ins. Code* §2071 (akin to an arbitration). They were not only dissatisfied with the result; they were dissatisfied with the performance of experts whom they hired to testify in the proceedings. They sued their experts for negligence. The experts demurred, citing the litigation privilege. The trial court agreed with the experts that the privilege protected them from the suit. The Court of Appeal did not and reversed, holding that the privilege did not apply where plaintiffs sued their own experts. *Lambert v. Carheghi* (Cal. App. First Dist., Div. 4; January 11, 2008) 158 Cal.App.4th 1120, [2008 DJDAR 489].

Court has inherent power to correct its own mistakes. *Code Civ. Proc.* §1008 imposes limitations on motions to reconsider prior rulings of the court. But in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, [112 P.3d 636, 29 Cal.Rptr.3d 249], the California Supreme Court held that even though a party may be precluded from moving for reconsideration, the court retained the inherent power to correct its own mistakes at any time while it still has juris-

diction over the case, provided the court give the parties notice of its intention to reconsider a prior ruling and give them an opportunity to be heard. In *IRMO Barthold* (Cal. App. First Dist., Div. 4; January 15, 2008) 158 Cal.App.4th 1301, [70 Cal.Rptr.3d 691, 2008 DJDAR 644] a motion for reconsideration was filed in violation of §1008. Nevertheless the Court of Appeal affirmed the order on reconsideration. The court held that the court's inherent power to correct its own errors applies even if the court's attention to the error is called by an invalid motion.

Note: *Barthold* creates a dilemma. *Le Francois* clearly held that motions to reconsider may not be filed unless the requirements of §1008 are satisfied. But *Barthold* seems to invite such motions. If the court *does* reconsider and change its ruling in response to an unauthorized motion, is the error harmless? Counsel still faces the prospect of sanctions if such an unauthorized motion is denied.

Mandatory relief limited to default judgments or dismissals. *Code Civ. Proc.* §473(b) requires the court to set aside a default judgment or a dismissal based on an attorney's "affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." But this does not mean that whenever a case is lost because of a lawyer's mistake the court must order a do-over. In *Huh v. Wang* (Cal. App. Sixth Dist.; December 28, 2007) (ord. pub. as Modified, January 16, 2008) [2008 DJDAR 789], defendant's lawyer failed to respond to requests for admission and failed to oppose a motion for summary judgment. The motion was granted. Thereafter defendant sought to have the judgment set aside under §473(b). The trial court denied the motion and the Court of Appeal affirmed the denial,

Best Practices for Winning at Litigation & Trial

Saturday, April 26, 2008,
8:30 am to 4:00 pm
Mission Inn, Riverside CA

Co-Chairs: Robert M. Bodzin
& Michael Geibelson
Honorary Chairs: Elizabeth Englund
& Mark Mellor

Live Seminar:

\$175 Litigation Section Members,
(admitted 6 years or more)
\$135 (admitted 5 years or less)
\$210 Non Litigation Section
Members, (admitted 6 years or more)

Webcast: \$65 per hour

holding that because a summary judgment is neither a default judgment nor a dismissal, defendant was not entitled to mandatory relief.

Note: Courts have been split on the scope of *Code Civ. Proc.* §473(b)'s mandatory relief provision. For further discussion see Weil & Brown, *California Civil Procedure Before Trial*, The Rutter Group, ¶ 5:300.6 ff.

Your Doctor says smoke it; but your boss disapproves. Out you go. Under California's compassionate use act, marijuana use is permitted if prescribed by a physician. But in a five to two decision the California Supreme Court has held that this does not preclude an employer from refusing to hire or firing persons using the weed, even if prescribed by a physician. *Ross v. RagingWire Telecommunications, Inc.* (Cal.Supr.Ct.; January 24, 2008) 42 Cal.4th 920, [174 P.3d 200, 70 Cal.Rptr.3d 382, 2008 DJDAR 1217].

CCP §998 offer must specify whether costs and fees are included. In our January 2008 issue we reported on a recent case holding that there was a "bright line rule" allowing costs and, if appropriate, fees after a statutory offer was accepted unless the offer explicitly included costs and fees. We failed to give you the case so holding. It was *Engle v. Copenbarger and*

Copenbarger (2007) 157 Cal.App.4th 165, [68 Cal.Rptr.3d 461]; see also, *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, [57 Cal.Rptr.3d 698].

Personal injury settlement annuity payments are not "income" as a basis for child support. In fixing child support the trial court excluded from father's income those payments he receives from the settlement of a personal injury suit. The Court of Appeal agreed. For purposes of fixing support, *Fam. Code* §4058 defines income as "the gain or recurrent benefit derived from labor, business or property or from any other investment of capital." Payments for personal injuries are not encompassed in this definition. *IRMO Rothrock* (Cal. App. Second Dist., Div. 8; January 23, 2008) 159 Cal.App.4th 223, [70 Cal.Rptr.3d 881, 2008 DJDAR 1211].

First amendment protects defendant's right to accuse plaintiff of having "fat thighs." There have been a number of cases involving attempts to force internet service providers to disclose the identity of persons who post internet messages. *Krinsky v. Doe 6* (Cal. App. Sixth Dist.; February 6, 2008) [2008 DJDAR 1999] is another such case. After plaintiff was fired, scurrilous messages about her were posted on the internet ("fat thighs" was one of the examples used by the appellate court, but presumably, that was not the

reason she was fired), she sued fictitiously named defendants and served a subpoena on Yahoo to seek the identity of the culprit. The Court of Appeal held that the First Amendment gave *Doe 6* the right to speak anonymously and ordered the subpoena quashed. The opinion provides an excellent explanation of how a "weighing test" is used to resolve the issue.

Special Offer to Litigation Section Members

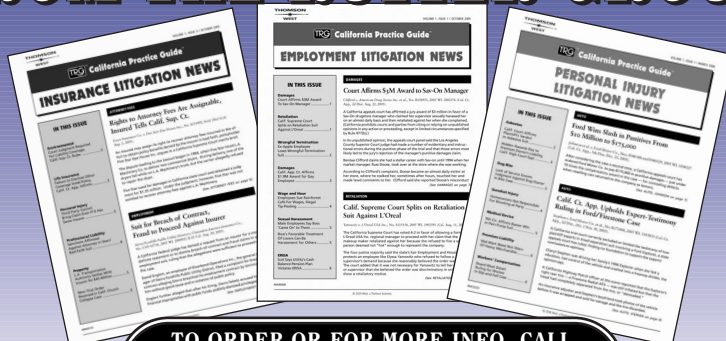
FINZ'S ADVANCE TAPES on California Civil Procedure, Discovery, and Evidence

Half-year Subscription (three issues), available as audio CD or audio tape, for only \$15. You also receive unlimited access to the website. Regular subscription price \$220 per year (six issues)

Sign up now at
<http://www.advance-tapes.com/litigation/specialoffer.html>

For information call (800) 564-2382.

NEWSLETTERS FROM THE RUTTER GROUP!



TO ORDER OR FOR MORE INFO, CALL
(800) 747-3161 (Ext. 2)
www.RutterGroup.com www.RutterOnline.com

Executive Committee

Mark A. Mellor, *Chair*
Gregory A. Nysten, *Vice-Chair*
Michael D. Fabiano, *Treasurer*
Elizabeth A. England, *Secretary*
Robert M. Bodzin
Dale C. Campbell
Lisa M. Cappelluti
Jay J. Chung
Michael A. Geibelson
Judy M. Lam
Paul S. Marks
Michele L. McGill
Martin Roy Robles
Eduardo G. Roy
Steven B. Sacks
Jahan C.R. Sagafi
Jacquelyn K. Wright

Advisors

e.robert (bob) wallach
Richard E. Best
Hon. Victoria G. Chaney
Hon. Lawrence W. Crispo
Hon. J. Richard Haden
Hon. James P. Kleinberg
Joel W. H. Kleinberg
Hon. Ronald S. Prager
Hon. Daniel S. Pratt
Hon. William F. Rylaarsdam
Jerome Sapiro, Jr.
Hon. James D. Ward
Hon. James J. Warren

Section Coordinator

Tom Pye (415) 538-2042
Thomas.pye@calbar.ca.gov

Administrative Assistant
Shelli Hill

Senior Editor

Honorable William F. Rylaarsdam
Co-author; Weil, Brown,
California Practice Guide, Civil Procedure Before Trial,
Co-author, Rylaarsdam and Turner
California Practice Guide, Statutes of Limitations,
by The Rutter Group

Managing Editor

Mark A. Mellor, Esq.